A Couple of Decent Learned Intermediary Cases: Straight, No Chaser

Monday, November 14, 2011

This is our third straight post on the learned intermediary doctrine. Many things in life come in threes. We bet you have an aunt who, every time a famous person departs this vale of tears, announces that two more will shortly follow. Sometimes the rule of three celebrity deaths is fulfilled by a bit of stretching. Academy Award and Nobel Prize winners die, and then crazy auntie issues an I-told-you-so upon learning of the expiration of a minor actor who once played a villain on "Sheriff Lobo." Skeptical though we may be, we cannot deny that art, religion, and politics from all the world's cultures invest a special significance in the number 3. There were three Fates, three witches in **Macbeth**, three government departments that Rick Perry would eliminate, three Pep Boys, and, of course, Three Stooges.

On an episode of "Who Wants to Be a Millionaire" the $500,000 question was, "How many actors played the Three Stooges?" The contestant was a former clerk of Sixth Circuit Judge Danny Boggs, and he had chosen Judge Boggs as his "lifeline." Judge Boggs is certainly one of the most brilliant judges in America. He is famous for the quiz he sends out to clerk applicants that tests wide-ranging areas of learning. For example, "Distinguish Belisarius from Bucephalus from Bocephus." Anyway, Judge Boggs had to admit on National TV that he couldn't say how many thespians played Stooges. The answer is six: Moe, Larry, Curly, Shemp, Joe Besser, and Curly Joe DeRita. (No, Ted Healy and Emil Sitka don't count.) So the next time you have an oral argument in the Sixth Circuit and are frightened of facing Judge Boggs - who makes any panel "hot" - just remember that you know something he doesn't.

For some reason, our post on Friday about a federal court making up exceptions to the learned intermediary rule out of whole cloth makes us think of the Three Stooges. It was farcical and we half expected the opinion to end in a pie fight. Not so with today's two cases. In both of them, federal courts followed the state law as it was, declined to invent anything new, and sent plaintiffs packing based on the learned intermediary doctrine.

Speaking of brilliant judges, we are especially pleased to see a nice learned intermediary opinion from Judge Weinstein in the Zyprexa Prods. Liability Litigation - *Greaves v. Eli Lilly*, 2011 U.S. Dist. LEXIS 129443 (E.D.N.Y. Nov. 8, 2011). A lot of interesting things have come from the Zyprexa litigation. Some good, some bad. When we saw an extensive table of

contents in the *Greaves* case, going all the way from Roman numeral I to Roman numeral V, we were expecting the usual Judge Weinstein tome. But the opinion is barely eight pages long, and it gets to the point with clarity and brevity. We'll try to cut to the chase as well as Judge Weinstein does, as he becomes the second federal judge to predict that Rhode Island courts, which haven't yet adopted or rejected the learned intermediary doctrine, would adopt it. The reasoning is straightforward:

-- the learned intermediary doctrine has been adopted in almost every state;

-- there is nothing in Rhode Island law to suggest that the Rhode Island Supreme Court would not adopt it; and

-- given the notoriety of Zyprexa litigation, "the manufacturer has a right to rely on the physician's duty to warn the patient of clearly perceived dangers."

Greaves, 2011 U.S. Dist. LEXIS 129443 at *23.

Judge Weinstein in a prior Zyprexa opinion held that the March 1, 2004 Dear Doctor letter would be considered the latest possible date on which members of the medical community knew or should have known of Zyprexa's relevant risks (weight gain and diabetes). The facts in *Greaves* confirm the wisdom of that holding. When the plaintiff's doctor treated the plaintiff in May 2004, the doctor discussed those risks with the plaintiff, monitored the plaintiff's blood glucose, and subsequently reduced the dosage after weight gain. The doctor testified that, despite the risks of Zyprexa, he believed it was the right medication to prescribe. Bottom line: "There is no evidence that Dr. Whalen would have altered his prescription decision had the warning that accompanied Zyprexa been different." *Id*. at *24. As Bocephus would say, "Been There, Done That" and "Everything's Okay."

As we said last Friday, we really really hate it when a federal court conjures up exceptions to the learned intermediary when there is no hint that the state Supreme Court would adopt such exception. Our position is bolstered by a court that approached the issue the correct way in *Swoverland v. Glaxosmithkline*, 2011 U.S. Dist. LEXIS 127753 (D. Conn. Oct. 5, 2011). The *Swoverland* opinion appears to be a transcription of an oral ruling from the bench. We actually don't know what drugs are at issue. But we gather that the plaintiff alleged failure to warn

under the Connecticut Product Liability Act. The federal court right away observes that Connecticut has adopted the learned intermediary doctrine. But the plaintiff contended that the doctrine should be called off in this case because "these drugs were directly advertised to the consumer and ... were over-promoted by the manufacturer." 2011 U.S. Dist. LEXIS 127753 at *3-4. Rather than give way to the inner policymaker, fantasy author, or Platonic Philospher King, the judge in *Swoverland* kept it clean and simple. First, there is no "clear indication from the Connecticut Supreme Court that any of these exceptions, potentially exceptions, are available under Connecticut law." *Id*. at *4. Second, even assuming these exceptions might be available, the court found them inapplicable because this was not a case where a patient revved up by DTC ads went into the doctor's office requesting the drug but, "rather, the plaintiff went to his doctor with certain medical issues and the doctor, exercising professional judgment, selected the drugs with knowledge of their potentially positive effects as well as their potential negative side effects." *Id*. at *5. If the usual medical facts apply, thern so should the usual legal rules. Also, just as in the Zyprexa case, the doctor stuck by his prescribing decision, even knowing whatever he is supposed to know now. Thus, there was nothing in the record "that would support the suggestion that there was a causal link between the lack of warnings complained of and the harm that befell the plaintiff." *Id*. at *6-7.

Is there anything we don't like about this pair of learned intermediary decisions? As Bucephalus would say, "Nay."